

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Petition for Declaratory Ruling That)	
AT&T's Phone-to-Phone IP Telephony)	WC Docket No. 02-361
Services are Exempt From Access Charges)	

ERRATA

On February 10, 2003, BellSouth Corporation, on behalf of itself and all wholly owned affiliates ("BellSouth"), filed an Errata in the above referenced proceeding.

Subsequent to filing the Errata, it was discovered that page 10 was omitted from the courtesy copy of Reply Comments provided with the Errata. Accompanying this Errata is a full set of Reply Comments reflecting the change made in the Errata filed on February 6, 2003.

BellSouth is serving all parties with an entire set of Reply Comments.

Respectfully submitted,

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Dated: February 10, 2003

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REPLY COMMENTS OF BELLSOUTH

BellSouth Corporation, on behalf of itself and its wholly owned subsidiaries,
("BellSouth") hereby submits its Reply Comments in the above referenced proceeding.

I. INTRODUCTION

AT&T's petition seeks to open a loophole in the current intercarrier compensation regime that will allow for a complete end run of access charges. AT&T attempts to have the Commission exempt access charges from a voice call when a carrier uses Internet Protocol ("IP") for the transmission of a voice call at some stage along the transmission path. Just as with a call that does not undergo a packetized conversion, a phone-to-phone IP telephony call uses the local exchange carrier's ("LEC") network for origination and termination of the call. AT&T argues that the exemption is warranted simply because the call may traverse the Internet. As BellSouth discussed in its comments, this fact alone does not magically exempt a carrier from paying access charges to the LEC for use of the LEC's network in order to provide a voice call, just as it does for all other voice calls that originate and terminate on the LEC network. Not surprisingly, those entities that provide phone-to-phone IP telephony support AT&T's position. They certainly have a financial incentive to do so. Their financial stake, however, should not overrule the Commission's long precedent or rules and orders governing intercarrier compensation.

The comments simply present the same stale positions argued by AT&T in its petition. Just as with AT&T's petition, the comments offer nothing persuasive to suggest that carriers are today exempt from paying access charges on phone-to-phone IP telephony or that the Commission should find such calls to be exempt in the future. A phone-to-phone call is what it is and the fact that part of it is transmitted using IP is no reason to dismantle the Commission's intercarrier compensation regime. BellSouth agrees, however, with two points made by commenters supporting AT&T's petition. First, the Commission should rule quickly on this matter. Regulatory clarity is necessary in today's environment. Unlike the pleas in the comments that support AT&T's petition, the Commission's quick ruling should deny AT&T's petition and confirm the long-standing rules of the Commission that access charges apply to phone-to-phone IP telephony. Second, the Commission should rule in the intercarrier compensation docket and move to a bill and keep system as proposed by BellSouth in that docket,¹ thus eliminating the types of issues raised by AT&T's petition.

II. DISCUSSION

A principal predicate of AT&T's petition is that because phone-to-phone IP telephony may traverse the Internet, then it should be completely free from any form of Commission regulation. Many of the commenters that support the petition argue the same point.² As BellSouth demonstrated in its comments, the form of transmission does not govern the applicability of access charges, nor does the transmission medium of some portion of a call alter

¹ *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92.

² Comments of the American Internet Service Providers Association, et al., at 5-16 ("Joint Commenters"); Comments of Global Crossing North America, Inc. at 8-13; WorldCom Response at 2-5; Comments of Net2Phone, Inc. at 1-5.

the use of the LEC's network in the origination or termination of that call. The formula is really quite simple. Access charges apply to all interstate telecommunications services. Phone-to-phone IP telephony is a telecommunications service. Accordingly, access charges apply to phone-to-phone IP telephony.

Instead of acknowledging these points, the commenters argue, as did AT&T, that: (1) phone-to-phone telephony is part of the Internet, thus it must be exempt; (2) the Commission's Report to Congress is an unequivocal pronouncement that the Commission has chosen not to regulate phone-to-phone IP telephony as a telecommunications service;³ and even if the *Report to Congress* did not create an exemption for phone-to-phone IP telephony, the Commission should grant one through AT&T's petition because it is a nascent market and the application of access charges would stifle its growth; and (3) it would be difficult to segregate phone-to-phone IP telephony from other forms of information services, thus it should also be treated as an information service.⁴ None of these are valid reasons to create a new access charge exemption for a phone-to-phone IP voice call.

A. Use of the Word "Internet" Is a Smoke Screen Used to Obfuscate the Issues

Most commenters seize upon AT&T's claim that the transmission of a portion of a phone-to-phone IP telephony call over the Internet graces it with an untouchable quality making it free from any notion of access charges, or any form of regulation. There are two variants of this claim. One is a watered-down "it's the Internet, stupid" claim. The other variant is that

³ Joint Commenters at 4.

⁴ Comments of Level 3 Communications, LLC at 14.

phone-to-phone IP telephony is a nascent market whose growth will be hampered if it is not allowed free access to the LECs' networks. Neither variant is compelling.

The Commission should recognize that AT&T is asking the Commission to create new policy with regard to access. Because phone-to-phone IP telephony is clearly a telecommunications service, AT&T does not attempt to argue that the enhanced services exception should be extended to its service. Rather, necessity being the mother of all invention, realization of this conundrum was no doubt the basis for the arguments invented by AT&T and advanced by the commenters. Relying on the Internet to support an exemption, however, is tantamount to arguing that a call transmitted over microwave at some point in the transmission should be exempt from access charges simply because a translation of wireline to wireless occurred. No one doubts the absurdity of this position; and the Commission must recognize the parallel between it and what AT&T seeks in its petition. The mere fact that a portion of the transmission is over the Internet does not favorably impact AT&T's request. The bottom line is that a voice call is made from a telephone and terminated over another telephone via the public switched telephone network ("PSTN"). Transmission technology is completely transparent to the caller and receiver of the call and which transmission technology is used before handing the call off to the LEC is irrelevant to whether the carrier of the call should compensate the LECs for use of their networks.

No more compelling is the other variant of the argument. Several commenters lament that phone-to-phone IP telephony is in an infancy stage and a failure by the Commission to exempt it from access charges will stunt its growth.⁵ In an attempt to bolster this claim, the

⁵ Level 3 Comments at 12.

commenters argue that packet switch technology is the wave of the future but application of access charges will slow that deployment. This argument collapses under its own weight.

First, the same commenters that forecast pending doom for the deployment of packet switch technology in the network if access charges are applied to phone-to-phone IP telephony are the same commenters that discuss the technological advantages of packet switch over circuit switch networks. BellSouth does not disagree with these advantages; however, it cannot logically understand why packet switch technology needs an unfair discriminatory financial advantage to ensure its deployment. If all factors are equal, certainly packet switch technology will be deployed for its superior technology.

Second, access charges apply for the use of the LEC's network. The Commission, which has long had a policy of not picking winners or losers in technology, cannot discriminate among the types of technology that are used to transmit calls in order to stimulate the growth of a particular technology to the detriment of another. AT&T and its supporters would have this Commission rule that a carrier that uses IP technology in the transmission of a phone-to-phone voice call should be free from access charges while another carrier transmitting the same call entirely over a circuit switch network would be subject to access charges. The inequities inherent in such a situation are palpable. Indeed, AT&T's own comments in the *Report to Congress* docket said it best: "Nowhere is this inequity more blatant than in the case of phone-to-phone telecommunications services that use Internet Protocol ("IP") technology in their long-haul networks Moreover, any failure to enforce USF and access charge payment obligations flies in the face of the Commission's commitment to technology-neutral policies, and triggers more artificially-stimulated migration from traditional circuit switched telephony to

packet switched IP services that are able to take advantage of this ‘loophole.’”⁶ Its conclusion then—“any Commission failure to enforce USF funding obligations (and access charge assessments) on telecommunications services that are provided over new technology backbones skews the market by making providers of comparable services subject to vastly different payment obligations”⁷—remains true today. Accordingly, calls by AT&T and others to dismantle the intercarrier compensation rules outside of a rulemaking proceeding should be perfunctorily dismissed.

B. Claims That the Report to Congress Created an Exemption for Phone-to-Phone IP Telephony Are Meritless

As an initial matter, the Commission cannot change its rules or policies, especially one as major as changing intercarrier compensation, outside of a proper rulemaking proceeding. Clearly then, any argument claiming that the Commission changed its intercarrier compensation rules in its *Report to Congress* has no merit. To suggest otherwise would require a complete rewrite of the Administrative Procedures Act.⁸

Thus, to contend that access charges do not apply to phone-to-phone IP telephony, AT&T and the commenters that support AT&T must begin with the flawed presumption that access charges never applied to a phone-to-phone IP telephony call. This, of course, is unrealistic given that the Commission’s rules are very clear that access charges apply to interstate

⁶ AT&T Comments on Report to Congress, CC Docket No. 96-45, at 12-13 (filed Jan. 26, 1998).

⁷ *Id.* at 12.

⁸ BellSouth does not disagree with the concept of changing the intercarrier compensation rules; however, it must be in the docket established specifically for that purpose, not in the current proceeding, which was filed in an attempt to create a “loophole” in the access charge system.

telecommunications services and phone-to-phone IP telephony is clearly a telecommunications service. One set of commenters ("Joint Commenters") attempt to overcome this flaw by suggesting that LECs do not have the authority to charge and collect access charges on phone-to-phone IP telephony. They argue that carriers seeking to charge carriers for access charges may do so only "pursuant to (1) Commission rules; (2) tariff; or (3) contract."⁹ The Joint Commenters then argue that LECs' attempts to collect access charges for phone-to-phone IP telephony is unlawful because "[t]here is no Commission rule that enables carriers to impose access charges for IP Telephony" nor do "the access tariffs enable carriers to impose access charges for IP Telephony traffic."¹⁰ This argument is equally flawed because it assumes that a voice call transmitted from one phone to another phone is not included in the access charges allowed by Commission rules and included in LECs' access tariffs if the voice call is converted to IP somewhere along the transmission path. None of the commenters, however, offer anything to support such an assumption. Indeed, even in the *Report to Congress*, the document AT&T and the commenters rely upon to argue in favor of an exemption, the Commission stated that phone-to-phone IP telephony "closely resemble[s] traditional basic transmission offerings."¹¹ The Commission found that "the provider [of the service] does not offer a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information."¹² The Commission went on to state that "[f]rom a functional standpoint, users of

⁹ Joint Commenters at 20. The Joint Commenters do not address the contractual issues stating that it was not the subject of AT&T's petition. *Id.* at 23.

¹⁰ *Id.* at 20-21.

¹¹ *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Report to Congress*, 13 FCC Rcd 11501, 11541, ¶ 83 (1998).

¹² *Id.* at 11544, ¶ 89.

these services obtain only voice transmission, rather than information services such as access to stored files. Routing and protocol conversion within the network does not change this conclusion, because from the user's standpoint there is no change in form or content."¹³

As BellSouth, and others, discussed in detail in their comments, phone-to-phone IP telephony is nothing more than a normal voice call that originates and terminates over standard telephones. LECs have had the authority to collect access charges on these types of services and have included such access charges in their tariffs for years.

C. Potential Difficulty In Distinguishing Phone-to-Phone IP Telephony Traffic From Internet Access and Other Information Services Traffic Is No Basis For Establishing Discriminatory Regulatory Policy

While the convergence of technologies may well make it difficult to differentiate between different types of services, that is in no way justification for exempting access charges on phone-to-phone IP telephony services. The reasons are indubitable. First, as the Commission has recognized, phone-to-phone IP telephony is nothing more than a voice call and is indistinguishable from a circuit switch voice call. Thus, there is no policy reason to discriminate in favor of it over circuit switch technology. Second, any cost that a provider of phone-to-phone IP telephony may incur to measure minutes for the application of access charges should merely be the cost of doing business. It is likely that such burden, if any, would be small. Phone-to-phone IP providers originate and terminate traffic using different phone numbers and different equipment than ISP traffic, so packets are not mixed with Internet packets at the originating and terminating ends of the calls. Further, many, if not all, phone-to-phone IP telephony carriers already measure traffic for billing purposes. ILECs, particularly Bell operating companies

¹³ *Id.*, ¶ 89 and n.188.

("BOCs"), are consistently required to incur significantly greater cost for the implementation of regulatory requirements. More broadly, existing carriers who offer telecommunication services are required to have such measuring capabilities. There is no justification for excusing competitors who find it inconvenient to have such capability from this requirement.¹⁴ The Commission, however, cannot declare phone-to-phone IP telephony exempt from access charges merely because certain companies would prefer not to deploy the capabilities required for intercarrier compensation settlements and regulatory compliance.

¹⁴ BellSouth does not suggest that regulatory burden is not a valid issue for the Commission to consider when making regulatory decisions; however, such evidence should be presented in a proper rulemaking proceeding, not in a proceeding such as the current one before the Commission. If the carriers have compelling evidence to show these costs to be significant, the Commission can consider such evidence in a rulemaking proceeding on the matter.

III. CONCLUSION

In its comments, BellSouth demonstrated that there was absolutely no evidence presented by AT&T to support an exemption for access charges for phone-to-phone IP telephony. None of the parties supporting AT&T have been able to fill the factual void. Accordingly, the Commission must unequivocally reject requests to allow carriers to circumvent the Commission's long-standing access charge rules by avoiding access charges on the provision of phone-to-phone IP telephony.

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Dated: January 24, 2003

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I do hereby certify that I have this 24th day of January 2003 served the parties of record to this action with a copy of the foregoing **REPLY COMMENTS OF BELLSOUTH** by Electronic Mail and U.S. Mail addressed to the parties listed on the attached service list:

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